Supreme Court, U. S.
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In the

Supreme Court of the United States

APRIL TERM, 1979

No. 78-793

PHILIP F. DiLEO,

Petitioner

v.

THE BOARD OF REGENTS OF
THE UNIVERSITY OF COLORADO, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

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November 1978.

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The petitioner, PHILIP F. DiLEO, prays that a writ of certiorari issue to review the judgment and opinion of the Colorado Supreme Court entered in this proceeding on August 28, 1978.

OPINION BELOW

The opinion of the Colorado Supreme Court in this case, as yet unreported, appears as Appendix A hereto, *infra*. The opinion of the trial court, The District Court in and for the County of Boulder, State of Colorado, is unreported, and appears as Appendix B hereto, *infra*.

JURISDICTION

The opinion and judgment of the Colorado Supreme Court was entered on August 28, 1978. This Petition for Certiorari was timely filed within ninety days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

The petitioner, Philip F. DiLeo, filed suit against the University of Colorado seeking, *inter alia*, a judgment establishing his eligibility for consideration for admission to the University of Colorado Law School under a "Special Academic Assistance Program" administered by the law school. The questions presented for review are:

1. Whether an applicant for admission to a State-funded school of law who seeks consideration for admission under a special admissions program and whose is excluded from such consideration solely on the basis of his race has standing to challenge the constitutionality of his exclusion?

2. Whether §601 of Title VI of the 1964 Civil Rights Act (42 U.S.C. §2000d) or the Equal Protection clause of the Fourteenth Amendment permit the summary exclusion of a law school applicant from consideration for admission under a special program for culturally, educationally, and economically disadvantaged individuals, solely on the grounds of race?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment IV:

> "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

United States Code, Title 42:

> "§2000d No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

STATEMENT OF THE CASE

Philip DiLeo sought to be admitted to the University of Colorado School of Law in 1973 and 1974 through a program the University entitled the "Special Academic Assistance Program." The program was established to assist applicants who appeared to have the intellectual ability to graduate from law school, but who otherwise would not be eligible for admission under normal standards due to their deprived educational and cultural backgrounds.

According to the rules of the law school defining the program, it was designed:

> To identify prospective law students who appear to have the intellectual ability to graduate from this law school but would not otherwise be eligible for admission under normal admission standards, and who are members of identifiable groups which have not had adequate educational and cultural opportunities available to them and which are seriously underrepresented in the legal profession. It is understood that Negroes, Mexican-Americans and American Indians are such groups, members of which may be expected to constitute most, if not all, the participants in this program. It is not intended, however, to preclude the participation by members of other identifiable groups which are shown to fit within the standards set forth in the first sentence of this subsection."

In both of the years that Philip DiLeo applied for admission under the Special Academic Assistance Program, his application was rejected due solely to the fact that he was not a member of a designated "identifiable group" which was educationally or culturally deprived and "seriously underrepresented in the legal profession". At the time of Philip DiLeo's requests for consideration, an appli-

cant had to be of Black, Mexican-American, or American-Indian heritage to be considered a member of an "identifiable group" for admission consideration under the Special Academic Assistance Program.

As a result solely of his not being Black, Mexican-American, or Indian, Philip DiLeo was completely foreclosed from consideration for admission under the Special Academic Assistance Program despite his fully demonstrating his status as an applicant who had the intellectual ability to graduate but whose eligibility for admission under general admissions standards was hampered by the inadequate educational and cultural opportunities which had been available to him throughout his formative years.

Specifically, Philip DiLeo established in his application for consideration under the Special Academic Assistance Program and in uncontroverted allegations in his Complaint that he grew up in a slum area of New York City denominated as "Little Italy"; that as he grew up his family was supported by his father who was employed as a janitor and who earned $50.00 per week; that the DiLeos were poverty stricken to the point that the family of six shared a three-bedroom flat which rented for $30.00 per month and which had no hot water and no bathroom facilities; that DiLeo's parents spoke only broken English; that Philip DiLeo read his first book only when he was in the sixth grade; and that his admission to undergraduate studies came about only through his outstanding individual efforts while enrolled in a free airplane mechanic vocational school located in New York City.

Philip DiLeo further demonstrated in support of his consideration for admission through the Special Academic Assistance Program that, although his undergraduate course studies were initially hindered by the difficulties he had in adjusting to an academic and social atmosphere markedly different from his deprived background, he was

nevertheless able to successfully complete his undergraduate studies and graduate with a respectable grade point average which had steadily risen throughout his studies.

It was uncontested that, although Philip DiLeo would not have been admitted under the general admissions standards in effect in 1973 and 1974, had he been considered under the Special Academic Assistance Program he would have been eligible for admission and might have been admitted inasmuch as nine applicants whose "prediction" scores indicated that they were less qualified than DiLeo were not only considered for admission under the special program but actually were offered admission into the law school under the auspices of the Special Academic Assistance Program.

Upon the rejection of his application for consideration for eligibility in the Special Academic Assistance Program in 1974, DiLeo brought this action challenging his summary exclusion from the program on the basis of race. DiLeo contended that he was entitled to be considered for admission under this program for culturally and educationally disadvantaged applicants without regard to race or ethnic heritage.

The defendant law school moved for summary judgment on the grounds that the operation of the Special Academic Assistance Program to the complete exclusion from consideration of DiLeo was constitutional and did not constitute a denial of equal protection. Specifically, the law school asserted that the Special Academic Assistance Program served a substantial State interest in making preferential admission into the school available to individuals from culturally and educationally deprived backgrounds, to thus graduate competent lawyers who were members of groups the school determined were "seriously underrepresented" in the legal profession.

In seeking summary judgment, the law school expressly delineated four rationales in support of the claimed State interest in the operation of the program along racial lines:

(1) that minority attorneys would be better able to satisfy the needs of minority clients;

(2) that an increase in minority attorneys would lessen a perceived alienation by the populace towards the legal system;

(3) that minority attorneys would serve as important role models; and

(4) that increasing the number of minority law students would necessarily enrich the educational experience of all students.

In addition, the law school urged that, if the trial court were to hold the program unconstitutional, it should do nothing more than simply return DiLeo's application to the school for reconsideration, presumably in the absence of any special program for disadvantaged applicants such as DiLeo.

In ruling on the summary judgment motion, the trial court assumed as true that DiLeo was not eligible for admission under general admission standards, and that he indeed satisfied the requirements for inclusion within the program through his membership in an identifiable group which lacked educational and cultural opportunities and which was seriously underrepresented in the legal profession. The trial court further assumed as true that DiLeo would have been admitted into law school had he been considered for admission through the Special Academic Assistance Program by virtue of the inclusion of "Italian-Americans" as an "identifiable group" for the purposes of the program. (See Appendix B)

The trial court then ruled that the only issue Philip DiLeo could raise was whether the exclusion of Italian Americans as a *group* whose members were eligible for consideration under the Special Academic Assistance Program was arbitrary and capricious, ruling that this group exclusion was neither. (Appendix B).

On appeal, the Colorado Supreme Court affirmed the trial court, with one Justice dissenting. (Appendix A) The Colorado Supreme Court held that DiLeo lacked standing to contest his exclusion from the Special Academic Assistance Program despite his demonstrating that he was denied consideration for admission under the program solely on the grounds of race, while other applicants similarly situated in terms of qualifications and disadvantaged background were considered under the program and were actually offered admission into the law school.

In so holding, the Colorado Supreme Court considered the opinions of this Honorable Court entered in *Regents of the University of California v. Bakke,* ..... U.S. ....., 98 S. Ct. 2733, 57 L.Ed.2d 750 (1978), and concluded that *Bakke* neither mandated DiLeo's admission into law school nor provided him standing to contest his racially-based exclusion from the Special Academic Assistance Program.

Justice Erickson of the Colorado Supreme Court dissented, and in a separate opinion, indicated that he would rule that DiLeo not only had the necessary standing to contest his exclusion from the program, but also that the exclusion of DiLeo from the Special Academic Assistance Program was unconstitutional.

REASONS FOR GRANTING THE WRIT

1. THE JUDGMENT AND OPINION OF THE COLORADO SUPREME COURT IS CONTRARY TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA AND IS NOT IN ACCORD WITH THE DECISIONS OF THIS HONORABLE COURT, INCLUDING THE RECENT RULING IN *BAKKE V. REGENTS OF THE UNIVERSITY OF CALIFORNIA.*

STANDING

Philip DiLeo clearly has the requisite standing to challenge his racially-based exclusion from consideration for admission under the Special Academic Assistance Program of the University of Colorado School of Law.

The "gist of the question of standing" is whether a particular litigant has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult questions." *Baker v. Carr,* 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). The history of proceedings below and the nature of this controversy demonstrate irrefutably Philip DiLeo's substantial interest in the outcome of his legal battle to gain admission to the law school.

Philip DiLeo twice sought admission to the University of Colorado Law School through the Special Academic Assistance Program administered by the school. This program had as its specific purpose the preferred admission of prospective law students who had the intellectual abilities to graduate but whose eligibility for admission was hindered by the inadequate educational and cultural opportunities which had been made available to them. Philip DiLeo's request for consideration for admission under this

program was twice denied by the defendant law school, and following those denials, he filed the present lawsuit seeking judicial intervention in assistance of his endeavor to become a lawyer. His resolve to become an attorney remains unabated.

The defendant law school has steadfastly opposed in an actively adverse fashion DiLeo's attempts to gain admission into the school. These countervailing efforts were expended throughout the proceedings below in support of the school's earlier resolute determination that DiLeo was not eligible for admission to the school under the special admissions program. At no time has the law school faltered in its position that Philip DiLeo is not eligible for admission. There can be little question that the parties to this controversy were and are so appropriately adverse as to ensure that the issues presented will be satisfactorily honed for judicial consideration. *See Baker v. Carr, supra.*

The defendants moved for summary judgment on several occasions, and numerous briefs were filed with the trial court pertaining to the motions for summary judgment. In entering summary judgment, the trial court in fact assumed that DiLeo was a member of an identifiable group which had not had adequate educational and cultural opportunities available to it and was seriously underrepresented in the legal profession. The trial court further assumed that, although DiLeo would not have been admitted under general admissions standards, he would have been admitted had his "group", Italian-Americans, been designated by the law school as eligible for consideration under the special program, and that he was denied the right to apply under the special program solely because his group was not so designated. In granting summary judgment, however, the trial court concluded that the exclusion of DiLeo's "group" was within the lawful discretion of the law school.

Initially, it must be noted that the formulation of the Special Academic Assistance Program along group lines necessarily engendered certain claims by DiLeo concerning Italian-Americans, as to "group" educational and cultural deprivation and representation within the legal profession. The gravamen of DiLeo's claim of unlawful discrimination, however, is not that Italian-Americans are and have been discriminated against unlawfully, but rather, that he, an individual, has been denied the basic right to be considered as such. As all the Courts below conceded, Philip DiLeo did demonstrate that he was situated similarly to applicants within the "designated" racial or ethnic groups as to his rising above an economically, educationally, and socially disadvantaged background. This is and was undisputed.

What was controverted by the Colorado Courts, implicitly by the trial judge and expressly by the Supreme Court, was the scope of the judicial remedy available to Philip DiLeo. DiLeo did and does not truly seek a declaration that the Special Academic Assistance Program is unconstitutional as a whole, and must be struck down in its entirety. Rather, what he contests is the failure of the University of Colorado Law School to consider his application for admission on equal terms with other applicants similarly situated.

Philip DiLeo has standing by virtue of his intimate personal stake in the outcome of these proceedings. It is DiLeo whose opportunities for equal consideration have been denied, and it is DiLeo, and not some hypothetical candidate for general admission, whose complaint of unconstitutional treatment is directed at that aspect of the Special Academic Assistance Program which is unlawful: the designation of eligible disadvantaged students by race or ethnic heritage.

To argue that Philip DiLeo has no standing to contest his personal exclusion from an otherwise lawful program because of his race is to argue the absurd. What is unconstitutional is not the existence of a program for disadvantaged applicants, but rather, the limitation of that program to persons whose skin or surname entitles them to a disturbing and unseemly presumption of competitive inadequacy.

Several rationales were offered by the Colorado Sureme Court in support of its conclusion that DiLeo lacked standing. Initially, the court contrasted DiLeo with Allan Bakke on the theory that "but for" the very existence of a special admissions program, Bakke would have been admitted under general admissions procedures.

Although "but for" language does appear in the opinion delivered by Justice Powell announcing the judgment of the Court, *see University of California Regents v. Bakke*, ... U.S. ....., 98 S.Ct. 2733, 57 L.Ed.2d 750 n.54 (1978), reference to the history of the *Bakke* proceedings demonstrates that in fact it was never established conclusively that Bakke would have been admitted had there been no student positions allocated to the special program. In any event, however, as in *Bakke,* here illegal racial discrimination was definitely the "but for" cause of an individual's exclusion from equal participation in a State-supported program. *Bakke* illustrates that it is insufficient to merely speculate that Philip DiLeo would not have been admitted had he been considered on a constitutionally equal basis with other applicants similarly situated.

The Colorado Supreme Court also expressed its concern that DiLeo was asking them to assume the role of educators through what they perceived to be a demand for a complete judicial restructuring of admissions procedures. This concern is illusory. All that Philip DiLeo requests,

and is entitled to, is a judicial determination that applications for admission to the University of Colorado Law School be administered in a racially neutral way, such that applicants similarly situated are accorded similar treatment without regard to race or ethnic background.

Even if an appellate court were to declare as unconstitutional the entire Special Academic Assistance Program, this would not deprive DiLeo of standing. DiLeo was not accorded consideration for admission on an equal basis with other candidates similarly situated, and he is entitled to a judicial determination that this treatment was unlawful. The University of Colorado School of Law has indicated a desire to assist intellectually capable individuals who have been subjected to cultural, educational or economical disadvantage in their efforts to enter law school and become lawyers. Even if the present program is stricken as a whole, it is reasonable to assume that the law school may in the future implement a similar program redrawn along racially-neutral lines, and Philip DiLeo's interest in such a program is manifest.

The argument that DiLeo's success in challenging the program would leave him without remedy is a little bit like claiming that a Black law school candidate who is precluded from consideration by virtue of his race has no standing to contest such exclusion since a State has no legal duty to open and operate a school of law for its citizens. The Special Academic Assistance Program did and does exist, and DiLeo did and does have a right to have his application for admission considered on an equal basis with other individuals similarly situated as to cultural deprivation.

Indeed, to argue that DiLeo has no standing because the law school might in the future choose not to offer any special admissions program is analogous to claiming that the Black residents of Jackson, Mississippi could not attack

the city's operation of racially segregated swimming pools because the city could choose later not to operate any swimming pools at all. Obviously, it makes no sense to assert that the victims of unlawful discrimination have no right to challenge such discrimination merely because a possible consequence of a successful challenge might be a retaliatory response by the public entity which forecloses the very program or facility sought to be utilized on an equal basis. *Compare Palmer v. Thompson,* 403 U.S.217, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971).

The bottom line of standing is, as recently stated by this Court, whether a particular litigant has a "personal stake" in the outcome of a controversy. *Warth v. Seldin,* 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 2197 (1975). As pointed out by Justice Powell in *Bakke,* the appropriate standing analysis is not whether the student candidate would or would not have been admitted in the absence of a special program, but rather whether, because of the race-conscious operation of the program, an applicant was denied the opportunity to compete equally with those similarly situated. *University of California Regents v. Bakke,* ..... U.S. ....., 98 S.Ct. 2733, 57 L.Ed.2d 750 n.14 (1978).

As things stand now, Philip DiLeo simply will not be admitted to the University of Colorado despite his uncontested status as a culturally disadvantaged individual eligible for special admissions consideration. In the event that the race-conscious group eligibility aspect of the existing Special Admissions Assistance Program is declared unconstitutional, DiLeo will then have an equal opportunity for future admission. DiLeo's plight can well be contrasted with the eventual outcome of Marco DeFunis' campaign to enter the legal profession. *See DeFunis v. Odegaard,* 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974). It is one thing to say that Marco DeFunis' challenge to a racially discrim-

inatory admissions program was moot since he was about to realize his ambition and graduate from law school. It is another proposition altogether to assert that Philip DiLeo has no personal interest in seeking a determination that his unequal treatment was unconstitutional.

The Lawfulness of DiLeo's Exclusion from The Program

This Honorable Court's decision in *Regents of The University of California v. Bakke, supra,* is dispositive. The egalitarian ideal of a color-blind constitution is a concept deeply imbued in the intellectual fabric of our democratic society. *See, e.g., Plessy v. Ferguson,* 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (Dissenting opinion of Justice Harlan). Although this admirable ideology has often been disregarded in practice, nevertheless the concept of the "equal hand" is a principle fundamental to a just society. *See Yick Wo v. Hopkins,* 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 2d 220 (1886).

The past decisions of this Honorable Court have established the unconstitutionality of racial criteria in the field of education. Educational opportunities are to be made available on equal terms to all regardless of race. *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 823 (1954). A legal education must therefore be made available on the same basis for all persons similarly situated. *Sweatt v. Painter,* 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114 (1950). *See also Missouri ex rel. Gaines v. Canada,* 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208 (1938). Basic to this concept of equal treatment of persons "similarly situated" is the requirement that individual attributes and capacities determine eligibility for a legal education. Simply stated, this means that all individuals have a right to be judged on their personal merit and not on their race or ethnic descent. Social deprivation may well be an appropriate factor to be considered in determining eligibility for law

school admission, and indeed this is precisely the enunciated rationale of the Special Academic Assistance Program administered by the University of Colorado School of Law.

Bakke requires the invalidation of the "group" criteria involved in the challenged program here. As was pointed out by Justice Erickson in his dissent to the opinion issued by the Colorado Supreme Court, the admissions program administered by the University of Colorado School of Law is "essentially and fatally similar" to that struck down in *Bakke.* The Colorado program creates a *per se* racial classification, which thus requires application of strict judicial scrutiny. *See University of California Board of Regents v. Bakke, supra. See also Bolling v. Sharpe,* 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954). As in *Bakke,* the purposes sought to be furthered by the Colorado program can be promoted by less onerous and racially-neutral means. And, as in *Bakke:*

> The fatal flaw in [the] preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment. *Shelley* v. *Kraemer,* 334 U.S. 1, 22, 68 S.Ct. 836, 92 L.Ed. 1161, 3 A.L.R.2d 441 (1948). Such rights are not absolute. But when a State's distribution of benefits or imposition of burdens hinges on the color of a person's skin or ancestry, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial interest.

Philip DiLeo would urge that, as in *Bakke,* the University of Colorado cannot demonstrate the necessity of limiting preferential academic assistance to members of delineated racial or ethnic groups.

CONCLUSION

This Petition for Certiorari presents issues of a critically important character. *Bakke* left open the lawfulness of preferential admissions policies for disadvantaged applicants administered in a racially-neutral manner. A great many colleges and universities operate programs similar to that in question here, and such programs receive many applications submitted by deserving law school candidates from disadvantaged backgrounds. The uncertainty concerning special admissions programs necessarily attendant to *Bakke* can be removed by the Court accepting this case for review and rendering a much-needed decision.

Philip DiLeo has overcome myriad social injustices in his efforts to better himself. He has managed to rise above the cultural abyss that is "Little Italy" to the point that he was able to obtain a college degree. Since 1973, he has waged a heretofore unsuccessful battle for equal consideration for admission to law school in furtherance of his ambition to enter the practice of law. The decisions below in effect have told Philip DiLeo that he may not contest the unequal consideration his eligibility for law school admission has received. This was unjust.

DiLeo has a great personal interest in having this Petition granted. In addition, the issues raised herein are of pressing contemporary concern. For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX 1-A

IN THE SUPREME COURT OF THE STATE OF COLORADO

NO. 27455

PHILIP F. DiLEO,
Plaintiff-Appellant,
v.
THE BOARD OF REGENTS OF THE UNIVERSITY OF COLORADO, FRED BETZ, SR., GERALDINE BEAN, DALE ATKINS, ERIC W. SCHMIDT, THOMAS S. MOON, JACK KENT ANDERSON, RAPHAEL J. MOSES, ROBERT M. GILBERT, and BYRON JOHNSON, as members of the Board of Regents of the University of Colorado, ROLAND C. RAUTENSTRAUS, President of the University of Colorado, COURTLAND H. PETERSON, Dean of the University of Colorado School of Law, JAMES N. CORBRIDGE, JR., Vice-Chancellor for the Academic Affairs and member of the Committee on Admissions, University of Colorado School of Law, ALEX KUO, Assistant Vice-Chancellor for Academic Affairs, University of Colorado, PEARL I. COLVIN,

Assistant Dean for Admissions and Placement, University of Colorado School of Law, and WILLIAM E. RENTFRO, Director, Special Academic Assistance Program, University of Colorado School of Law,

Defendants-Appellees.

Appeal from the District Court of Boulder County
Honorable David R. Torke, Acting District Court Judge

EN BANC RULING AFFIRMED

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MR. CHIEF JUSTICE PRINGLE delivered the Opinion of the Court.

This case involves a challenge to the constitutionality of the Special Academic Assistance Program (S.A.A.P.) as established and administered by the University of Colorado School of Law.

The law school's program is set forth in article 6 of the Rules of the law school. Rule 1-6-2(c)ii establishes the

standards for eligibility for the program and reads in pertinent part as follows:

> "[A] program designed to identify prospective law students who appear to have the intellectual ability to graduate from this law school but would not otherwise be eligible for admission under normal admission standards, and who are members of *identifiable groups which have not had adequate educational and cultural opportunities available to them and which are seriously underrepresented in the legal profession.* It is understood that Negroes, Mexican-Americans and American Indians are such groups, members of which may be expected to constitute most, if not all, the participants in this program. It is not intended, however, to preclude participation by members of other identifiable groups which are shown to fit within the standards set forth in the first sentence of this subsection." (Emphasis added).

Groups which meet the listed criteria are selected by reviewing various materials, primarily census bureau data, which reflect such information as median and per capita income, education level and representation in the legal profession. Both national and regional figures, when available, are reviewed. Regional figures in particular are used in assessing representation in the legal profession.

Using this method of review, the law school determined in 1974 that Asian Americans and Italian Americans did not fit the program's criteria, at that time. The group of Italian Americans was defined as foreign born or native born with one foreign born parent.

In 1975, it was determined that Cubans and Hawaiians were not to be included in the program but that Puerto Ricans would be included.

Applicants for the S.A.A.P. are screened to determine whether they are members of an eligible group. The S.A.A.P. is a competitive admissions program for those eligible and both subjective and objective criteria are used in evaluating eligible applicants.

The approximate number of students to be admitted is determined in advance, based on available facilities. This predetermined number of spaces is only filled if there are qualified applicants available. We do not here determine whether this use of a predetermined number affects the constitutionality of the program because we decide the case on another issue.

Plaintiff DiLeo applied for admission to the law school through the S.A.A.P. for the entering class of 1973 and subsequently for the entering class of 1974. In both years, the application was rejected on the basis that he was not a member of an identifiable group having inadequate educational and cultural opportunities and seriously underrepresented in the legal profession. Following these two rejections, DiLeo brought this action in the District Court for the County of Boulder challenging the S.A.A.P.

The trial court in granting the law school's motion for summary judgment, held that DiLeo did not have standing to challenge the constitutionality of the program itself since if there were no S.A.A.P. he would not have been admitted to the law school. The trial court, stating that DiLeo could only challenge the exclusion of his group from the program, also held that the law school had not acted arbitrarily or capriciously in excluding the group of which DiLeo was a member from eligibility in the program.

The case is now before us on appeal and we affirm the trial court's ruling to the extent it holds that DiLeo's application was properly rejected for consideration in the S.A.A.P.

The case before us presents a sensitive and complex issue, an issue the resolution of which has important moral and social consequences. The law school has established the S.A.A.P. to increase minority enrollment and minority representation in the legal community. Similar programs have been established by colleges and universities throughout the nation to remedy the effects of past societal discrimination.

DiLeo claims that the program as established and operated by the School of Law of the University of Colorado is unconstitutional. He argues that while a program for the disadvantaged is itself constitutional, the S.A.A.P. as administered by the law school is unconstitutional in that it operates to exclude persons solely on the basis of their race or ethnic background. Specifically, he argues that he being of Italian American heritage and a product of slum schools, was educationally, socially and economically disadvantaged and should have been considered an eligible applicant for the S.A.A.P.

The essence of Plaintiff's Fourteenth Amendment argument is that the law school violated his right to equal protection of the laws by denying him admission to the law school while admitting applicants who he claims were similarly situated.

While this case was pending before us, the United States Supreme Court issued its decision in *Regents of the University of California v. Bakke,* ..... U.S. ....., 98 S. Ct. 2733, ... L.Ed.2d ..... (1978). In *Bakke,* the Court reviewed a challenge to the validity of a medical school's special admissions program. The result of this review was that the Medical School of the University of California at Davis was ordered to admit Alan Bakke to the school.

Alan Bakke, a white male, alleged that the special admissions program operated to exclude him on the basis of his race in violation of the Equal Protection Clause of

the Fourteenth Amendment of the United States Constitution, a provision of the California Constitution, and §601 *et seq.* of Title VI of the Civil Rights Act of 1964. The *Bakke* case reached the Court in a posture where Alan Bakke was considered qualified for regular admission and would have been admitted to the medical school but for the special admissions program.

There was no majority opinion of the Court in the Bakke case. Only five of the Justices actually addressed the constitutional issue. Four of these Justices (Brennan, White, Marshall and Blackmun) found that the special admissions program did not violate the Constitution. These Justices concluded "that Davis' goal of admitting minority students disadvantaged by the effects of past discrimination is sufficiently important to justify use of race-conscious admissions criteria." ..... U.S. at ....., 98 S.Ct. at 2789, ... L.Ed.2d at ..... (1978).

Mr. Justice Powell, who announced the judgment of the Court, found that the special admissions program served a compelling state interest[1] but that a racial "quota" was not

[1] Powell found that the attainment of a *diverse student body* was compelling in the context of a university's admissions program. The United States Supreme Court has previously recognized the importance of this goal. In *Sweatt v. Painter,* 339 U.S. 629, 634, 70 S.Ct. 840, 850, 94 L.Ed. 1114, 1119 (1950), that Court stated:

> "Moreover, although the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of views with which the law is concerned. . . . [W]ith such a substantial and significant segment of society excluded. . . . we cannot conclude that the education offered . . . is substantially equal. . . ."

Accord, Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); *DeFunis v. Odegaard,* 82 Wash. 2d 11, 507 P.2d 1169 (1973), *vacated as moot,* 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974).

necessary to achieve this interest. However, he did determine that the competitive consideration of race and ethnic origin might properly be a part of an admissions program.

Mr. Justice Stevens, in an opinion joined by Chief Justice Burger, Mr. Justice Stewart and Mr. Justice Rehnquist, determined that Title VI applied and that Bakke was excluded from the medical school in violation of Title VI. These Justices did not reach the constitutional issue of whether race can ever be a factor in an admissions policy. Whether in the absence of Title VI considerations, or given an amended version of Title VI, any of these Justices might join the Fourteenth Amendment conclusions of Justices Brennan, Marshall, White and Blackmun is yet to be decided.

The law school asserts that the decision in *Bakke* does not mandate DiLeo's admission to law school. We agree.

The threshold question to be addressed is whether DiLeo has standing to challenge the constitutionality of the S.A.A.P. The general rule as developed in Colorado is that a person to have standing to challenge the constitutionality of state actions must be personally adversely affected by the particular constitutional defect asserted. *E.g., People v. Stage,* ..... Colo. ....., 575 P.2d 423 (1978); *Garcia v. City of Pueblo,* 176 Colo. 96, 489 P.2d 200 (1971); *People v. Stark and Peacock,* 157 Colo. 59, 400 P.2d 923 (1965). The following language from *McKinley v. Dunn,* 141 Colo. 487, 492, 349 P.2d 139, 142 (1960) is instructive in this regard:

> "We follow the generally accepted rule that constitutionality is to be considered only in the light of the standing of the party who seeks to raise the question and that a person may challenge the constitutionally of a statute *only when and as far as it is being or is about to be applied to his disadvantage. Cross v. Bilett,* 122 Colo. 278, 221 P.2d 923." (Emphasis added).

The trial court's finding that DiLeo had no standing was based on its view that in effect there would be no remedy available for DiLeo even if the court agreed with his allegations of unconstitutionality. We agree.

Initially we note that Philip DiLeo is not in a similar position to Alan Bakke in that "but for the existence of the special program" Bakke would have been entitled to the educational benefit of admission to medical school. It is clear from the record that DiLeo would not have been eligible for admission to the University of Colorado School of Law under normal admissions standards.[2] Thus even *if* the S.A.A.P. were unconstitutional in respect to an applicant who like Bakke would have been admitted if there were no special admissions program, DiLeo is not situated so as to make that challenge.

In fact, DiLeo does not want the special admissions program to be declared unconstitutional. Rather, he wants it to be redrawn along non-racial lines. The program as established by the law school is drawn along group lines. For example, one of the principal criteria of the program is that the applicant be a member of a *group* which is underrepresented in the legal community. DiLeo asks us to declare unconstitutional this group aspect of the program. But this would be in effect to strike down the program as presently constituted. It is not the proper function of a court to establish an admission program for a university,

[2] In fact it is not clear that even if DiLeo had been considered eligible for the S.A.A.P. he would have been admitted. In 1973, of 59 applicants who were offered admission through the S.A.A.P., 50 had higher prediction indexes than DiLeo and 24 applicants who were members of eligible groups and had higher prediction indexes than DiLeo were denied admission. (A prediction index is a composite factor which is derived by combining in a mathematical formula (1) the applicant's grade point average, (2) a quality rating of the applicant's degree school, (3) the applicant's LSAT score, and (4) the applicant's writing ability score.)

nor to rewrite the program according to its own notions. Thus the import of DiLeo's argument would be to leave the university with no special admissions program. Since DiLeo would not be admitted through the regular admissions program, a successful challenge to the program's unconstitutionality would leave DiLeo's position unchanged.

Our holding in *Lee v. People,* 170 Colo. 268, 460 P.2d 796, (1969), is applicable at this point. In *Lee* we noted that the defendant had no standing to raise an equal protection argument because the "[d]efendant could not benefit in any way by such a ruling here and, therefore, is in no position to raise the issue in this case." 170 Colo. at 273, 460 P.2d at 799. DiLeo is in this same position. He cannot benefit from a ruling that the special admissions program is unconstitutional; therefore, he has no standing to raise that issue.

We affirm the ruling of the trial court.

MR. JUSTICE ERICKSON dissents.

MR. JUSTICE CARRIGAN does not participate.

NO. 27455

DiLEO v. BOARD OF REGENTS, UNIVERSITY OF COLORADO

MR. JUSTICE ERICKSON dissenting:

I respectfully dissent. In my view, the record demonstrates an injury to DiLeo that is likely to be redressed by a favorable decision on his behalf. *Regents of the University of California v. Bakke,* ..... U.S. ....., 98 S.Ct. 2733, 2743-44 (n. 14), ... L.Ed.2d ..... (1978) (Powell, J.); *Warth v. Seldin,* 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

Guided by *Bakke,* which admittedly reflects diverse and divergent views of the Justices of the Supreme Court

of the United States and provides definitive guidelines in only the most ephermeral sense, I would hold that the University of Colorado School of Law Special Academic Assistance Program (S.A.A.P.) is unconstitutional.

I.

Standing

The trial court ruling which we are called upon to review assumed (1) DiLeo was denied admission because his group was not designated, and (2) had his group been designated, he would have been admitted as a student.

The trial court did not rule upon the constitutionality of the S.A.A.P. on the theory that even if the program were unconstitutional, DiLeo lacked standing to challenge the program because he was not qualified for admission under the general admission standards.

As the majority opinion points out, this case differs from the *Bakke* fact situation in that Bakke would have been admitted but for the special admissions program at the University of California at Davis Medical School. Here, DiLeo claims that he was entitled to be considered for admission under the S.A.A.P. Under Law School Rule 106-2(c)(ii), students are admitted to the S.A.A.P. who are members of identifiable groups (1) which are seriously underrepresented in the legal profession and (2) which have not had adequate educational and cultural opportunities available to them. In both 1973 and 1974, the years when DiLeo applied for admission under S.A.A.P., 29 places in the law class of 175 were allocated in advance to the program. Only those who were Mexican-Americans, Black-Americans, and American Indians were considered for those places in 1973. On August 1, 1974, Puerto Rican-Americans were added, but Asian-Americans and Italian-Americans were declared ineligible.

DiLeo asserts that he comes from a background which is characterized by indicia of deprivation as severe as that faced by the designated minorities. Specifically, he has established that he grew up in New York's "Little Italy," a slum inflicted with crime, drugs and violence; that he was raised by uneducated, working class parents; and that, through his secondary education, he attended slum schools beset by ignorance and indifference. As such, he claims that he must surmount difficulties as great as those faced by those minorities given preference.

DiLeo is not asserting that it is unconstitutional for the Law School to have a S.A.A.P. to aid disadvantaged students, but claims he is disadvantaged and that his background qualifies him for consideration. As such, he asserts that he would be eligible for admission under the S.A.A.P. if non-racial criteria were applied, and that he has been denied meaningful participation in that program because of his race. The majority points out, at note 2, that:

> "In 1973, of 59 applicants who were offered admission through the S.A.A.P., 50 had higher prediction indexes than DiLeo and 24 applicants who were members of eligible groups and had higher prediction indexes than DiLeo were denied admission."

From this, the majority draws the conclusion that, even if DiLeo were considered in the special admissions program, he would not have been accepted by the Law School.

The majority's reference to this finding indicates that it misapprehends the import of *Bakke*. Nine persons who were participants in a program, from which DiLeo was excluded on the basis of his race, were less qualified and were not only considered, but also were offered admission to the Law School. Thus, it is unnecessary that DiLeo claim that he would have been admitted under the general admissions program and in the absence of the University

of Colorado's S.A.A.P. It is sufficient for purposes of standing that DiLeo establish that he was not considered as a disadvantaged student under the S.A.A.P. because he was not a member of a designated minority.

Moreover, I am persuaded that once it was shown that DiLeo was excluded from the S.A.A.P. because of his race, the burden of proof shifted to the University of Colorado to demonstrate that DiLeo would not have been accepted if he had been considered for admission under the S.A.A.P. In short, the University would have to demonstrate that DiLeo would not have been considered for admission under the S.A.A.P. even if that program did not use race as a decisive factor. *Board of Regents v. Bakke,* 18 Cal.3d 34, 553 P.2d 1152, 1172 (1976); *Franks v. Bowman Transportation Co.,* 424 U.S. 747, 773 (n. 32), 96 S.Ct. 1251, 47 L.Ed.2d 444 (1975).

II.

Suspect Classification

The issue common to both *Bakke* and this case is whether a racial classification which is intended to assist minorities, but which has the effect of depriving those not so classified of benefits they would enjoy but for their race, invokes the "compelling state interest" or only an "important governmental objectives" test. Only the Supreme Court of the United States can pronounce the final words on that question. *See Oregon v. Hass,* 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975). A majority of the Justices of that Court have yet to pronounce that word. *See Bakke, supra* at 2756-60, 64 (Powell, J.); *id.* at 2783-84 (Brennan, White, Marshall, and Blackmun, J.J.) (concurring in part and dissenting in part). However, at the present time, in order to meet the requirements set forth by Justice Powell, we must assume that the University must demonstrate a compelling state interest in maintaining its program and that no less restrictive method will effect its purpose.

The University cannot meet that burden in this case. The S.A.A.P. administered by the Law School is essentially and fatally similar to that established by the Medical School at Davis. The crucial fact is that both Bakke and DiLeo were denied meaningful participation in at least some major facet of the admissions program solely on the basis of their race.

Once it has been demonstrated that the S.A.A.P., as administered, created a *per se* racial classification, *Bakke* requires that the strict scrutiny test be applied. If the program affects a fundamental interest or employs a suspect classification, strict scrutiny is invoked, and the program can be upheld only if it is necessary to promote a compelling state interest, and that interest cannot be promoted by less onerous means. *E.g., Dunn v. Blumstein,* 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); *McLaughlin v. Florida,* 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964).

Race is a key to admission under S.A.A.P. because only members of specially selected racial groups are entitled to admission at the lower standards. Race is conclusive for purposes of excluding certain applicants, such as DiLeo, from participation. While students are not being admitted solely on the basis of race, it is clear that some potential students, including DiLeo, have been excluded from participation in the S.A.A.P. solely on that basis. The fact, relied upon by the majority, that S.A.A.P. applicants found to belong to the appropriate racial groups must compete among themselves for available positions and that several objective factors are considered in the admission process is irrelevant to DiLeo's constitutional challenge.

DiLeo does not challenge the establishment of a program to give preference to disadvantaged individuals. Nor does he challenge the University's reliance on its belief that the fact that an individual is a member of an identifiable, disadvantaged group makes it more probable that a member of that group is disadvantaged. Nothing in the *Bakke* opinion prevents the Law School from making that judgment. Justice Powell makes clear, however, that the University must define those groups it designates as disadvantaged in racially neutral terms. That is, when the Law School designates a minority group, the members of which it wishes to prefer, it may not designate that group by reference to its racial characterists.

For the reasons stated herein, DiLeo, in my opinion, has standing to challenge the S.A.A.P. S.A.A.P. creates a *per se* racial classification which is prohibited and must fail because of the limitations imposed by *Bakke v. Regents of the University of California, supra.*

APPENDIX 1-B

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF BOULDER
STATE OF COLORADO

Civil Action No. 75-2280

PHILIP DiLEO,
Plaintiff
vs.
THE BOARD OF REGENTS OF THE UNIVERSITY OF COLORADO, et al.,
Defendants

Court's Ruling on Defendants' Motion For Summary Judgment

Philip DiLeo applied for admission to the freshman class of the University of Colorado School of Law to enter in the Fall Semester, 1973. His application was denied.

DiLeo's suit for damages and for an injunction was filed in 1975. The defendants' Motion for Summary Judgment attacks all issues in that suit and is here determined.

FACTS

For the purpose of determining defendants' Motion for Summary Judgment, the following facts are taken to be true and uncontroverted.

1. DiLeo is not eligible for admission to the University of Colorado School of Law under normal admission standards; he is a member of an identifiable group which has not had adequate educational and cultural opportunities available to it and which is seriously underrepresented in the legal profession. (Note that these facts are taken as

true for the purpose of this motion only.) DiLeo is Italian-American.

2. The University of Colorado School of Law has designed and operates a Special Academic Assistance Program (SAAP) as defined in Law School Rule 1-6-2(c) as:

> . . . a program designed to identify prospective law students who appear to have the intellectual ability to graduate from this law school but would not otherwise be eligible for admission under normal admission standards, and who are members of identifiable groups which have not had adequate educational and cultural opportunities available to them and which are seriously under-represented in the legal profession. It is understood that Negroes, Mexican-Americans and American Indians are such groups, members of which may be expected to constitute most, if not all, the participants in this program. It is not intended, however, to preclude participation by members of other identifiable groups which are shown to fit within the standards set forth in the first sentence of this subsection.

3. DiLeo was denied the right to apply as a SAAP student solely because the law school did not designate his group (Italian-American) as one of the groups eligible for SAAP consideration.

4. Had DiLeo's group been designated for inclusion in the SAAP, DiLeo would be admitted as a law student under the SAAP.

ISSUE PRESENTED

Is the exclusion of Italian-Americans from SAAP consideration arbitrary and capricious?

(Counsel for plaintiff and defendant both argue that the issue is whether or not the SAAP is unconstitutional

because it is reverse racial discrimination and violates DiLeo's rights to equal protection of the law as guaranteed by the Fourteenth Amendment and the Colorado Constitution. Counsel expertly, extensively, and compellingly briefed and argued that issue.

Colorado has not yet responded to the controversy decided for the State of Washington in *DeFunis* v. *Odegaard*, 507 P.2d 1169 and for the State of New York in *ALEVY* v. *DOWNSTATE MEDICAL CENTER*, Opinion No. 63 decided April 8, 1976. *If* this court were required to decide the issue, and it is not, it would quote Mr. Justice Douglas as the New York court did:

> Mr. Justice Douglas wrote:
>
> "There is no constitutional right for any race to be preferred. The years of slavery did more than retard the progress of the Blacks. Even a greater wrong was done the whites by creating arrogance instead of humility and by encouraging the growth of the fiction of a superior race. There is no superior person by constitutional standards. A DeFunis who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner."

This court would hold that, if Mr. DeFunis' exclusion from the University of Washington School of Law was on a racially neutral basis — if it made no difference that he was white, Black-American, Chicano-American, American- Indian or Philippine-American or any other race, then the University of Washington program passes constitutional muster; otherwise it does not.

The reason this court need not decide that issue is that DiLeo does not allege, and could not show, a right to relief

in this lawsuit. If the SAAP program were declared unconstitutional, there would be no SAAP program to consider DiLeo's application. If the program is constitutional, then it excludes DiLeo by its terms.

As the New York court held in *Alevy* (Supra) "He failed to show his own right to relief, even if the entire minority program were eliminated.")

CONCLUSIONS

The issue which DiLeo can raise is whether the exclusion of his identifiable group was arbitrary and capricious action by the law school, an agency of the state.

DiLeo encourages and advocates the existence of a minority program at the law school. He wishes to deny the law school the right to limit the program to the exclusion of the culturally deprived Italian-American group of which he is a member.

Exhibits and affidavits presented by the defendants demonstrate a sincere and diligent effort by the law school to identify those groups which most clearly fit the guidelines set in Law School Rule 1-6-2 (c). It is obvious that the law school's resources for the SAAP have to be selectively expended.

Mr. DiLeo's assertion that the SAAP may not exist at all unless it is thrown open to all identifiable groups is an assertion that if the law school cannot correct the whole problem it may not attempt to correct the most egregious manifestation of the problem.

The court holds that the defendants acted well within their legally permitted discretion to determine who shall be admitted to the SAAP.

The Motion for Summary Judgment in favor of the defendants and against the plaintiff as to all issues herein is granted.

DONE IN OPEN COURT this 1st day of June, 1976.

BY THE COURT:

_____

(Acting) District Judge